

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DANIEL SWAN,

Defendant-Appellant.

UNPUBLISHED

February 5, 2004

No. 243700

Lapeer Circuit Court

LC No. 01-007344-FH

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced, as a second habitual offender, MCL 769.10, to serve a term of seventy-one months' to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence of an intent to do great bodily harm. We disagree.

“When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt.” *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999). A specific intent to do great bodily harm is an essential element of assault with intent to do great bodily harm. MCL 750.84; *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325, amended 453 Mich 1204 (1996). However, given the difficulty of proving state of mind, minimal circumstantial evidence is sufficient to prove that an actor had the requisite intent, *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985), which can be inferred from the surrounding facts and circumstances, *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983).

Great bodily harm has been defined as “a serious injury of an aggravated nature.” *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). With the respect to the injuries suffered by the victim in this case, the evidence at trial, when viewed in a light most favorable to the prosecution, indicated that after knocking the victim to the ground, defendant violently and repeatedly struck her approximately thirty times across the back, front, and side of the head, lacerating her forehead and causing a number of bruises as well as some swelling of the eyes and jaw. Even assuming that, as argued by defendant, the laceration and bruises inflicted upon the

victim were not injuries of an “aggravated nature,” a defendant may intend injuries greater than those he actually inflicted. See, e.g., *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992) (no actual injury is required to establish the elements of assault with intent to inflict great bodily harm). Moreover, it is significant that the head blows exacted by defendant could have, as testified to by the physician who treated the victim following the attack, been life-threatening. See *People v Peña*, 224 Mich App 650, 660; 569 NW2d 871 (1997) modified and remanded on other grounds 457 Mich 885 (1998).

Accordingly, given this evidence, and considering that questions of credibility and intent are properly resolved by the trier of fact, to whom we must give deference on such issues, see *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998), we conclude that the prosecutor presented sufficient evidence of an intent to do great bodily harm to support defendant’s conviction. See *In re Forfeiture of \$25,0505*, 220 Mich App 572, 581; 560 NW2d 341 (1996).

Defendant next argues that the photographic identification procedure used to corroborate with the victim the identity of her attacker was improper because it was conducted without counsel and in an unduly suggestive manner. However, defendant failed to preserve these issues for appeal and, therefore, only outcome-determinative plain error requires reversal. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). We find no basis to afford defendant such relief here. Indeed, the identification procedure did not affect the trial’s outcome because, as defense counsel acknowledged during his opening statement to the jury, the identity of the perpetrator was not at issue.¹ Moreover, an eyewitness who was not present at the photographic identification identified defendant in court, and two additional witnesses testified that defendant admitted responsibility for the assault. Therefore, any error in the identification procedure is not ground for reversal. *Id.*

Defendant also challenges the second of his two confessions, on the ground that he was not readvised of his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), before questioning. However, it is well settled that police need not readvise a suspect of his rights before questioning him again if the suspect previously declined to exercise his rights. *People v Godboldo*, 158 Mich App 603, 606-607; 405 NW2d 114 (1986). In any event, defendant failed to preserve this issue for review and, therefore, is entitled to relief only upon a showing of outcome-determinative plain error. *People v McCrady*, 244 Mich App 27, 29; 624 NW2d 761 (2000). Defendant challenges only his second confession and nothing in either confession sheds light on the only real issue at trial, i.e., whether defendant intended to inflict great bodily harm. Consequently, the confession did not affect the outcome of defendant’s trial and, therefore, cannot be a ground for reversal. *Id.*

Defendant also argues that he was denied a fair trial by the prosecutor’s comments regarding his alleged intent to drag the victim into the bathroom for the implied purpose of sexually assaulting her. However, although prosecutors may not mischaracterize or make factual

¹ During his opening statement counsel for defendant noted that defendant had confessed to the assault and would not deny that it was him if he testified, emphasizing that the issue at trial was defendant’s intent during the assault.

statements that are not supported by the evidence, they are free to argue reasonable inferences drawn from the evidence. *People v Watson*, 245 Mich App 572, 586, 588; 629 NW2d 411 (2001). Here, the statement at issue, although only tenuously supported by the evidence, was nonetheless a reasonable inference drawn from the evidence. Moreover, because defendant failed to preserve this issue by objecting in the trial court and requesting a curative instruction, he is entitled to review of this unpreserved issue only if a curative instruction could not have removed any undue prejudice to defendant, or if manifest injustice would result from failure to review the alleged misconduct. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003). Here, although the comment at issue went to the central issue of defendant's intent, any harm could easily have been cured by a timely instruction. Accordingly, defendant is entitled to no relief on this claimed error.

Finally, defendant challenges his sentence, arguing that it is disproportionate to the offender and the offense under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). However, because defendant committed the offense after January 1, 1999, he was sentenced under the statutory sentencing guidelines, MCL 777.1 *et seq.*, under which the Legislature set forth new ground rules for sentencing and the review of sentencing decisions. It is erroneous to apply past sentencing principles. *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). Under the statutory sentencing guidelines, if the sentencing court stayed within the guidelines recommended range, we must affirm absent a scoring error or inaccurate information used in sentencing the defendant. MCL 769.34(10).

The sentence in the present case falls within the statutory guidelines range for a second habitual offender, MCL 777.65, MCL 777.21(3)(a), and defendant does not claim a scoring error or inaccurate information used to determine his sentence. Moreover, review of the record reveals no such errors. Consequently, the sentence must be affirmed. MCL 769.34(10).

We affirm.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ Richard A. Bandstra